Global Governance, Antitrust, and the Limits of International Cooperation

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Global Governance, Antitrust, and the Limits of International Cooperation

Paul B. Stephan†

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Introduction

How can regulation keep up with transactions? The contemporary world economy facilitates international production and trade. In turn, partitioning transactions into separate geographical components allows parties to pick and choose regulatory regimes. Antitrust law has dealt with this problem for nearly a century. At one time, antitrust law regarded the assignment of a transaction to a particular territory as a prerequisite for the application of a jurisdiction's rules; lately it has required much less. As a result, overlapping national regulation has become the dominant structure regulating cross-border transactions.

Overlapping regulation has its own problems. Different national regimes may impose inconsistent rules and pursue conflicting ends. In response, regulators and scholars have begun to explore the possibility of international governance. The proposals vary, but at their heart lies a conviction that the inadequacies of national regulation justify the creation of international institutions to promote the coordination of national regulatory programs.1

I argue, in opposition to most commentators, that dispensing with international institutions is the most promising approach to the problem. Creating new international institutions to grapple with antitrust or assigning this task to existing organizations presents underappreciated risks, and the status quo of international near-anarchy has underappreciated benefits. The growing call by regulators and scholars to widen and deepen international cooperation in competition policy should be resisted. Judge Wood, a leading authority on international antitrust, recently wrote that "[h]armonization is something to which only a curmudgeon would take exception." I rise to that challenge.

My argument against international cooperation has both negative and affirmative elements. On the negative side, the calls for international imposition of either substantive rules of antitrust law or the assignments of regulatory jurisdiction rest more on hope than on evidence. There are good reasons to believe that either form of cooperation will produce undesirable outcomes. In particular, government failure at the national level may replicate itself at the international level, yet international regimes are more difficult to unwind than is domestic regulation.

On the affirmative side, I identify forces shaping international economic relations among the world's most prosperous and powerful states that can punish those nations whose antitrust laws produce substantial losses in global welfare and reward those that adopt policies that enhance global welfare. In an information-based economy with substantial interna-

law); Alan O. Sykes, Externalities in Open Economy Antitrust and Their Implications for International Competition Policy, 23 HARV. J.L. & PUB. POL'Y 89 (1999) (explaining ties between competition laws and trade policy); Daniel K. Tarullo, Norms and Institutions in Global Competition Policy, 94 AM. J. INT'L L. 478 (2000) (discussing the formation and enforcement of international antitrust policy); Michael J. Trebilcock, Competition Policy and Trade Policy, 31 J. WORLD TRADE 71 (1997) (arguing that member states of the WTO should agree to a system of competition law that eliminates protectionism); Spencer Weber Waller, An International Common Law of Antitrust, 34 NEW ENGL. L. REV. 163 (1999) (proposing that the WTO encourage cooperation in competition law without creating a "full international antitrust code"); Russell J. Weintraub, Competing Competition Laws: Do We Need a Global Standard?, 34 NEW ENGL. L. REV. 27 (1999) (arguing that nations should share information with the antitrust enforcement authorities of other nations); Diane P. Wood, International Harmonization of Antitrust Law: The Tortoise or the Hare?, 3 CHI. J. INT'L L. 391 (2002) (proposing a gradual and cautious approach to harmonizing competition law on an international scale). For skepticism, see John O. McGinnis, The Political Economy of International Antitrust Harmonization, 45 WM. & MARY L. REV. 549 (2003) (opposing substantive harmonization of competition law on the grounds that it would create high agency costs, would discourage beneficial change, and would not suit the needs of all countries bound by it). For a recent collection of diverse points of view, see COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY (Richard A. Epstein & Michael S. Greve eds., 2004).

2. Wood, supra note 1, at 391.

tional mobility of financial and human capital, and significant international trade, states that impose an antitrust system that protects domestic producers from welfare-enhancing competition should experience lower levels of investment and innovation. Countries that use competition law to punish more efficient foreign producers will suffer losses in consumer welfare without obtaining any offsetting competitive gains, once innovation losses are taken into account. Countries that use competition law to punish foreign producers that engage in inefficient forms of industrial organization, on the other hand, should experience some economic benefits.

This argument fits into a larger project. Since the end of the Cold War, the pull towards greater international cooperation in economic regulation has seemed irresistible. The growing prominence of existing institutions, especially the World Trade Organization ("WTO"), the International Monetary Fund ("IMF"), the World Bank, the Organization for Economic Cooperation and Development ("OECD"), and the organs of the European Union ("EU") and of the North American Free Trade Agreement ("NAFTA") is met with calls for the creation of new regimes with additional regulatory powers. Much of the criticism of these developments reflects either a deep suspicion of the culture and values of late-stage capitalism and global markets or an atavistic celebration of national sovereignty. My critique is different. One does not have to reject markets and competition as virtuous means to advance human liberty and dignity, nor privilege the nation-state as a paragon of democratic governance, to resist the kinds of international cooperation that seem to loom in the world economy's future. I argue that


one can accept the inevitability of the complex of phenomena too easily lumped together under the facile rubric of "globalization," worry about its consequences for people around the world, understand the limitations of nation-states in the face of these challenges, and still express skepticism about the burgeoning growth of an international technocracy. International antitrust simply presents an opportunity to test this general argument.

This paper proceeds in three parts. First, I provide a positive account of the incentives countries face under conditions of international trade to choose competition policies that do not maximize global welfare. This account rests on a demonstration that competition policy and trade policy are inseparable, and on a comparison of the potential welfare losses resulting from protection-motivated competition law to those resulting from conventional tariff-based protection. I argue that the less transparent nature of competition law makes its trade effects especially troubling. Second, I review proposals to develop international regimes to either harmonize substantive competition law or allocate regulatory jurisdiction. I identify reasons why such regimes are likely to be unsatisfactory. The same considerations that lead countries to use competition law as a form of protection remain relevant in the context of international relations. Moreover, an international regime will present additional problems of administration, application, and adaptation. Third, I discuss the long-term incentives to avoid the protection that nations face under conditions of factor mobility. I review the empirical literature on trade and development and argue that a similar positive correlation should exist between optimal choices of competition policy and economic growth. In the conclusion, I explore the limits of my argument and suggest areas for future inquiry.

I. The Protean Nature of Competition Policy and Its Potential for Abuse

Part of the problem of international antitrust is understanding the relationship between competition policy and antitrust law. Most U.S. regulators and some scholars seem to take for granted that the two subjects are congruent. A consensus among them exists about the goals of competition policy—principally the maximization of consumer welfare—and the general soundness of the means the United States uses to pursue those goals. It seems easy enough to assume that the rest of the world understands what we mean when we talk about competition and consumer welfare, and not too hard to believe that any disagreements about optimal

competition policy stems from an incomplete understanding of the state of the debate in the United States.

A moment's reflection, however, will suggest the difficulty in the problem of creating international competition law. From an international perspective, we do not have a common vocabulary or sense of the subject, much less a common commitment to substantive ends. Once one appreciates how undefined the concept of competition policy is, the difficulties of coordinating national regulatory regimes become clearer.

First, I explain why competition policy has no logical boundaries and instead bleeds into industrial policy and, more importantly, trade policy. Second, I provide a theoretical argument supporting the prediction that variance among nations will lead to significant differences in national competition policies. In particular, I explain how conventional competition policy techniques—merger regulation and attacks on producer collusion—can function as trade barriers. Third, I provide evidence that important states, on occasion, do use competition policy for protectionist ends. This undermines the often unstated assumption that only insignificant barriers stand in the way of a coordinated and institutionalized global antitrust regime.

A. What Is Competition Policy?

Competition policy means many different things to its various practitioners and students. At a formal level, its boundaries may seem clear. A government invokes competition policy to regulate private actors who coordinate their economic choices. U.S. antitrust law seems to be the principal and best example. But what of government decisions not to regulate economic coordination? Is this weak competition policy or, behind a facade of regulatory indifference, governmental direction of private economic cooperation? Once one recognizes the difficulty of distinguishing indifference from direction, it becomes impossible to cabin competition policy so neatly.

The fundamental indeterminacy of the concept becomes even clearer when one looks at its implementation in practice. Under the aegis of competition policy, governments regulate producer choices, including decisions to cooperate with other producers. Regulation of prices, of marketing practices, and of the array of products offered all come within its scope. Competition regulation involves decisions about competition, but does not necessarily involve a preference for the consumer welfare criterion as the benchmark of "competitive" markets. Supporting a national champion, suppressing large-scale efficient producers that threaten politically influential small producers, and setting quotas on output all can constitute "competition" policies, even though most economists would regard

9. See Fox, Doha Dome, supra note 1, at 915.
these strategies as presumptively inimical to consumer welfare.10

This seemingly obvious point is critical. Most regulators, practitioners, and scholars in the United States believe that competition policy involves government intervention against anticompetitive behavior by private actors. But competition cannot be an end to itself. Some kinds of collusion can be unambiguously desirable, such as some provision of standardized goods or long-term supply contracts. As Oliver Williamson famously observed decades ago, markets and organizational hierarchies typically exist as alternatives, and there are no a priori reasons always to prefer one over the other.11

One cannot have a competition policy, then, without some concept of desirable cooperation. It follows that a state concerned about the level of competition in a given market might either forbid or mandate particular forms of cooperation. Competition policy thus fades into industrial policy. They are conceptually the same, even if the two terms suggest different regulatory methodologies, attitudes, and specialists.

Further, except in closed economies, competition and trade policy overlap. Trade policy, at its heart, involves choices concerning the level of competition between domestic and foreign producers that a state will permit or encourage. This point seems obvious as a matter of logic, but, for reasons I explore below, it becomes paramount with respect to industries that have increasing returns to scale, the most important sectors of the richest national economies. In many instances, competition and trade policies thus become two sides of the same coin.

Why does a conviction persist that competition policy constitutes an autonomous discipline with its own technical expertise?12 Competition law appeared in the United States in response to private decisions to consolidate production.13 Its principal manifestation was the Sherman Act, which attacked cooperative actions "in restraint of trade" and abuses of


monopoly power. However, we should regard this congruence between competition law and public regulation of private cooperation and consolidation as a historical accident, not as the core of what constitutes competition policy.

Even with its historical background, U.S. competition law never has manifested an implacable hostility to all forms of industrial consolidation. It accepts, for example, cooperation among producers organized or mandated by the several U.S. states. It also allows collusive political action to bring about such state mandates. The United States for almost a century has promoted collusion among exporters. More recently, it has supported similar cooperation among producers in supposedly strategic economic sectors such as semiconductor design and production. When one turns to Europe or Japan, examples of competition policy coexisting with and even reinforcing coordinated producer behavior abound.

The overlap between competition and trade policy leads to two important complications. First, as I discuss below, a state may tailor its regulatory choices to its position in the world economy, favoring producers or consumers depending on which actors predominate locally. Second, a state may purport to pursue a uniform competition policy but, in practice, apply different rules to foreign and domestic actors. In theory, trade law forbids this. All developed countries have accepted an obligation of "national treatment" or nondiscrimination between its own subjects and others. The protean nature of competition policy, however, promotes

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15. Parker v. Brown, 317 U.S. 341, 350-52 (1942) (reasoning that the Congress could have, but did not, intend for the Sherman Act to restrain state action); California v. ARC Am. Corp., 490 U.S. 93, 100-05 (1989) (invoking the presumption against finding federal preemption of state law in areas traditionally regulated by states); City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 370-73 (1991) (holding that where municipalities put in place anticompetitive restraints to implement state policy, immunity from Sherman Act liability extends to these municipalities).

16. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-42 (1961) (holding that efforts to influence the legislature to pass anticompetitive laws were not within the scope of the Sherman Act); Mine Workers v. Pennington, 381 U.S. 657 (1965) (holding that union activity is not covered by the Sherman Act); Profl Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 56-58 (1993) (holding that litigation initiated with the intent to cause anticompetitive harm to a rival does not constitute a violation of antitrust laws as long as the claims objectively have some merit).


19. See Michael J. Trebilcock & Edward M. Iacobucci, National Treatment and Extra-territoriality: Defining the Domains of Trade and Antitrust Policy, in COMPETITION LAWS IN
administrative discretion and facilitates discrimination disguised by a veil of fact-specific, balancing-of-the-totality-of-circumstances analyses.

An obvious example of discriminatory competition law is the antidumping regime that most developed countries employ, WTO standards restricting antidumping regulations notwithstanding. Formally, antidumping is part of trade law while predatory pricing is the subject of antitrust. But functionally, these rules target the same behavior—successful price competition that crowds out competitors. In most countries, however, foreign producers face more onerous restrictions. Under U.S. antitrust law (which applies to domestic and foreign producers alike), prohibited predation requires proof of below-cost sales in circumstances where new entrants are unlikely to enter the market once the predator raises prices. Dumping, which applies only to imports, penalizes any sale at a price below that used in the producer's home market, even if the import price comprises a profit margin.

Antidumping regimes present a specific instance of a more general problem. Imagine Good A, the production of which has substantial economies of scale. Further, imagine that Good B is a substitute for Good A. Suppose that the producers of Good B can influence decisions by the authority that regulates the market where Goods A and B compete. If this regulatory authority has the discretion to forbid levels of consolidation that preclude the achievement of economies of scale, an enforcement action brought against the producers of Good A will protect the Good B producers from salutary competition. Moreover, if the competition authorities operate under a sufficiently discretionary mandate, they can take this action without compromising their ability to tolerate comparable collusion by producers of Good B. Nothing in the concept of "competition policy" precludes regulatory choices that decrease the overall level of competition in a market or, much less, requires the level of competition that maximizes welfare.

The broad definition of competition policy not only makes sense logically, but underscores the difficulties of achieving an international consensus about its content. Even if states could agree that efficiency—optimization of the sum of consumer and producer welfare—is the only legitimate objective of competition policy, agreement as to whether a particular regime advances or detracts from efficiency would remain elusive.

CONFICT, supra note 0, at 152 (arguing that the GATT national treatment principle suffices to regulate international antitrust).


Specifying the optimal mix of competition and cooperation in a particular economic sector is inevitably controversial. Technological innovation and other kinds of change, as well as shifting consumer preferences, limit the lessons one can learn from a sector's history. Once legitimate differences over the optimal level of competition arise, it becomes difficult, if not impossible, to determine whether a regulator is pursuing efficiency-driven competition policy.

The proliferation of alternative objectives for competition policy multiplies the difficulty of finding common ground. Given the difficulty of fixing optimal levels of competition, we should expect much competition law to take the form of elastic standards rather than of precise and constraining rules. With increased discretion comes inconsistency. For example, one cannot insist on maximizing consumer welfare and still promote national champions or protect inefficient small producers. In turn, tolerance of inconsistency opens the door to discrimination. Regulatory choices driven by animus towards foreign producers can be reconciled with other, permissible rationales. The more open-ended and multi-factored the policy and the greater the discretion of regulators to decide where and how to apply competition policy, the easier it becomes to disguise trade protection as competition policy. Strategic deployment of competition law would be most feasible where governments have exclusive enforcement authority.

B. Competition Policy and Local Interests

Once one accepts that competition policy embraces great, and potentially pernicious, flexibility, it becomes possible to speculate about what ends a given state might choose to pursue. Modern trade theory offers strong support for specific uses of competition rules to protect domestic producers. Public choice theory provides a more general explanation for why individual states would invoke competition policy for illiberal ends. Both analyses predict that, absent an effective international regime to constrain their choices, national regulation of competition will generate global welfare losses.

23. See Frank H. Easterbrook, Does Antitrust Have a Comparative Advantage?, 23 HARV. J.L. & PUB. POL'y 5, 7 (1999) ("And here's the big point: [B]y and large, we can't know when competition has 'failed.'") (emphasis supplied).

24. See Guzman, Lesson, supra note 1, at 939; see also Swaine, supra note 1, at 966-74.

25. The United States is an outlier in terms of the extent to which actors other than the national government have enforcement power. Even in the United States, however, governmental enforcement decisions have a powerful effect on private suits, as evidenced by the preference of private plaintiffs to follow in the wake of Justice Department litigation. See Mark R. Joelson, An International Antitrust Primer: A Guide to the Operation of United States, European Union, and Other Key Competition Laws in the Global Economy 168-76 (2d ed. 2001).
1. International Trade Theory

As a conceptual matter, three considerations can influence a state's incentives to externalize the effects of its competition regulation. First, producers in the sector in question may be over- or underrepresented in that state as compared to the global distribution of that sector's producers. For example, oil and natural gas production dominates a few national economies, while many important economies, such as the European Union and Japan, produce virtually none of that good. Second, consumers of the good in question similarly may be over- or underrepresented in the state. Third, the global market for the good may be more or less competitive. This last factor will affect the distribution between producers and consumers of potential gains from industrial consolidation.

Consider first a good, the production of which has increasing returns to scale up to the market clearing price. "Natural monopolies" and "network goods" are general instances of this phenomenon. The good may have declining marginal costs due to economies of scale, or the value created by the good may increase with its consumption. In either case, the most efficient producer is a monopolist. Further, assume that consumption of this good is more or less evenly distributed globally—if not per capita, then per dollar of gross domestic product. Ignoring strategic issues and the possibility of coordination, a state should prefer to be the home of this industry. The state can then capture some portion of the producer's monopoly rents, while its consumers will suffer no more than if any other state hosted the monopolist.

Under conditions of increasing returns to scale and international trade, a rational competition policy would have the state protect the local producer and inflict costs on the producers of all other states. Monopoly does not produce global welfare losses (although some local consumers and producers will be worse off than they would be if the state forbade the monopoly), and it benefits the host state to the extent of producer surplus. While some consumers in the host state might suffer, most of the lost consumer surplus will be externalized to outsiders.

Strategic trade theory, as developed by Krugman and others in the late 1970s, addresses exactly these features of international trade. It maintains that increasing returns to scale characterize production in many sectors and that monopoly industrial organization thus constitutes the norm rather than a deviation for large portions of the most developed econo-


The premises of liberal trade theory—that international trade proceeds in competitive markets and that comparative advantages in production capacities determine the efficient distribution of production—thus do not hold. Strategic trade theory argues that the distribution of monopolist producers explains trade patterns better than the distribution of producer endowments. As a positive matter, it predicts that the higher levels of international trade that result from lowered costs of transportation and communication as well as reduced legal barriers will bring about greater levels of industrial concentration. As a normative matter, strategic trade theory specifies the circumstances where states should prefer protection (broadly conceived to include subsidies to the local producers as well as import barriers) to free trade. This justification for protection goes strongly against the grain of liberal trade theory, which denies the value of protection.

What does strategic trade theory suggest for countries that have no hope of hosting an industry with increasing returns to scale? A country's choices depend on its share of the global market for the good in question. Those with small shares usually will not be able to prevent the foreign producer from moving toward monopoly. If such a country tried to regulate the producer, in response the producer could either raise prices in the local market or refuse to import. Both outcomes would hurt consumers in the regulating country and have no offsetting benefits. A country with a sufficiently large share would have another option. Such a country would have the capability to force the producer to internalize the costs of its regulation. It rationally would block efficient growth by the producer in instances where the benefits from consolidation, no matter how large, would accrue to the producer and the increase in competition would generate some benefits for local consumers, no matter how small. Put simply, under specified conditions, which seem realistic if not abundant, some countries will have both an incentive to restrict producers from undertaking welfare-enhancing consolidation and cooperation, and the capacity to implement that policy. These states will choose a competition policy that, in terms of global efficiency, requires too much competition and not enough hierarchy.

29. Id. at 158-77.
32. For discussion of the tensions between strategic trade theory and liberal theory, and a reconciliation based on political economy arguments, see Paul R. Krugman, Is Free Trade Passe?, 1 J. Econ. Persp. 131, 143 (1987) ("It is possible, then, both to believe that comparative advantage is an incomplete model of trade and to believe that free trade is nevertheless the right policy.")
The mirror argument also applies. Some states may host producers that have diminishing returns to scale and export most of their production. Examples would include industries that depend disproportionately on factor endowments, such as extraction or farming. These states might benefit if their producers participated in a successful cartel. Monopoly rents would stay at home, and the lion’s share of the lost consumer surplus would fall on consumers in the export markets. Under these conditions, states would embrace a competition policy that not only tolerates, but mandates, cartelization. In other words, these states would seek to effect a competition policy that, in terms of global efficiency, requires too much hierarchy and not enough competition.34

These incentives become even more salient when states can evade the national treatment obligation and discriminate against foreign producers. In this case, regulators can apply one standard of acceptable collusion to foreign producers, and another to domestic producers. For increasing-returns-to-scale industries, a rational regulator would block collusion by foreign producers, while encouraging local producers to consolidate and grow. With respect to decreasing-returns-to-scale industries, the same regulator usually would promote competition among foreign producers. If little domestic consumption and large levels of domestic production of the good have occurred in its country, however, the regulator would tolerate or even promote cartelization of the industry.

In sum, both uniform and selectively enforced competition law can function as forms of trade protection. However, because selective enforcement is harder to detect and monitor than a direct trade barrier, it may pose a greater problem than conventional forms of protection. Uncertainty about when competition law will apply may deter risk-averse actors and require wasteful investments in precautions, such as legal services and lobbying. The ambiguous and elusive nature of this kind of protection also may make it more difficult to mobilize coalitions to oppose it. By contrast, conventional trade barriers, in the form of high tariffs or quotas, are quantitatively precise, are easier to detect and to oppose, and generally entail lower costs of organizing opposition.35

2. Political Economy

The previous subsection premised its arguments on an unrealistic assumption, namely that political decisionmakers seek to optimize the welfare of the polity that they represent and govern. Positive theory predicts, and plenty of evidence confirms, that in many situations governments will pursue outcomes that reflect the preferences of homogenous and compact

34. See Guzman, Lesson, supra note 1, at 943; Guzman, International Antitrust, supra note 1, at 1512-18.
interest groups at the expense of the general welfare. Lower organizational costs enable some groups to elicit rents from government. One of the best studied and documented examples of successful rent-seeking is that of domestic producers seeking protection against foreign competition to the detriment of domestic consumers. Producers have focused identities and technological expertise; consumers suffer from an array of identities—worker, family member, sports fan—and lack specialized knowledge. It is rational for producers to invest more than consumers do in obtaining desired outcomes from government, and rational for politicians to provide a return to this investment.

Political economy provides another set of explanations for variances among national competition policies. The ability of particular groups to minimize the costs of organization and political action must reflect differences in the way politics is carried out and financed as much as variety in group characteristics. Therefore, we should not expect the winning groups in different countries to be similar, much less benefit to the same extent.

To summarize, no conceptual reason exists for competition policy not to serve the ends of trade protection, and both modern trade theory and public choice theory identify incentives leading states to pursue policies that lower global welfare. What still must be established is that states actually vary in the regulatory choices they make in the name of competition policy, and that this variation is inefficient from a global perspective. A secondary issue is whether states exploit the flexibility that competition policy gives them to impose different regulatory choices on foreign producers in violation of their national treatment obligation. I consider evidence of these practices in the next section.


37. The original insight is credited to Pareto. See Vilfredo Pareto, Manual of Political Economy 379 (Ann S. Schwier & Alfred N. Page eds., Ann S. Schwier trans., Augustus M. Kelley Pub. 1971) (1927). For later works developing the same point, see Mueller, supra note 36, 238-42 (discussing rent-seeking through tariffs and quotas); Olson, supra note 36 (explaining why some groups are more able to exert influence on government than others); Anne O. Krueger, Government, Trade, and Economic Integration, 82 Amer. Econ. Rev. 109, 110-11 (1992) (providing various examples of small, well-organized interest groups extracting protective measures from the legislature). See also Douglas A. Irwin & Randall S. Kroszner, Interests, Institutions, and Ideology in Securing Policy Change: The Republican Conversion to Trade Liberalization After Smoot-Hawley, 42 J.L. & Econ. 643, 651-66 (1999) (tracing shift away from protectionism to an increase in influence of exporters, not of consumers).
C. The Evidence

By hypothesis, in a world where international trade occurs, one and only one competition policy can maximize global welfare. Any deviation from that policy among states must reflect one of four considerations:

(1) The nonconforming law applies to an economic sector not subject to international trade.

(2) The nonconforming law reflects a decision by the regulating state to reduce the welfare of its subjects in pursuit of a policy goal that is not amenable to a welfare calculus. (A variation on this consideration is that people in different states may differ in their consumer preferences, and thus the consumer welfare criterion may vary among states.)

(3) Variations in laws reflect genuine empirical disagreements among regulators as to the consequences of particular regulatory choices.

(4) Variations in laws reflect efforts by a local population to externalize the costs of regulatory choices while capturing their benefits.

Consideration (1) is unlikely to explain differences between the major developed countries, all of which have significant levels of international trade. Consideration (2) seems implausible with respect to these states, given the abundance of standardized consumer goods, as evidenced by global brands that trade in these economies. Significant differences among states in the content of their competition law—horizontal variation—could reflect either consideration (3) or (4), and are not proof of welfare-reducing deviations from an ideal global policy. Significant differences within states as to the content of law applicable to domestic and foreign persons—vertical variation—are consistent only with consideration (4). Moreover, the presence of substantial vertical variation within a country at least hints that its contribution to horizontal variation also reflects consideration (4).

Surveying the competition law and enforcement practices of the major economic powers—the United States, the European Union, and Japan—we find overwhelming evidence of horizontal variation and significant circumstantial evidence of vertical variation. This is enough at least to shift the burden of proof to anyone who would deny that the competition laws of these countries contribute to deadweight losses in the world economy. A prima facie case thus can be made that the status quo of international antitrust is suboptimal.

1. Horizontal Variation—Institutional Features

Differences in the institutional structures of the three principal economic powers are evident. The United States disperses enforcement power among two federal agencies, the Antitrust Division of the Justice Department and the Federal Trade Commission, and private attorneys general, who benefit from various financial incentives such as treble damages and procedural advantages such as class actions, broad pretrial discovery, and jury trials. A residual and ill-defined power of states to apply their own
regulatory regimes further complicates the picture. In the European Union, by contrast, the Competition Directorate of the European Commission has broad and preemptive power over enforcement. The fifteen Member States have some residual power to regulate competition, but all rely on a single national authority with virtually no private enforcement. Lastly, Japan has a unified regulatory authority (the Fair Trade Commission), no subnational entities with regulatory powers, and high barriers to private litigation. Some degree of collaboration between the government and industry cartels exists, although scholars debate the extent and scale of the government's contribution to these cartels.

2. Horizontal Variation—Substantive Aspects

The substantive goals of U.S. antitrust law reflect the shifting preferences of administrations as well as changes in the courts' understanding of competition regulation. Over the last thirty years, U.S. regulators have taken a more relaxed attitude toward forms of collusion and industrial concentration that seem driven by efficiency considerations. Consumer welfare has become the touchstone of competition policy, as distinguished from opposition to the accumulation of power and influence in the hands of private firms. The courts too have moved in this direction, embracing efficiency as the principal criterion for whether collusion and industrial concentration are permissible and approving anticompetitive practices that


40. See id. ¶ 10.


43. Gifford & Kudrle, supra note 10, at 220-23.
plausibly may increase consumer welfare. Finally, for sixty years, the courts have permitted state-level experimentation with alternative approaches to the trade-off between competition and collusion. In a reversal of the normal preemption rule that underlies U.S. federalism, state-administered collusion displaces federal regulation.

In form, the substantive goals of European Community ("EC") competition law seem virtually identical to those of the United States. Articles 81 and 82 of the current revision of the Treaty of Rome closely track Sections 1 and 2 of the Sherman Act. Article 81 prohibits "concerted practices" that "may affect trade between Member States" and "have as their object or effect the prevention, restriction or distortion of competition." Article 82 outlaws "any abuse" of "a dominant position." However, given the cultural, economic, political, and sociological differences between the two entities, it should surprise no one that these capacious words have achieved a significantly different meaning in the EC. At the risk of oversimplification, EC competition law evinces greater skepticism about the benefits of producer consolidation and cooperation than does recent U.S. practice. One aspect of this skepticism, not so much articulated as displayed, is concern about private concentrations of power threatening governmental authority. In addition, EC competition law clearly opposes the substitution of lower-level—that is national—supervision for Community-administered competition policy. Unlike the United States, the lower-level entities cannot authorize anticompitive practices.

An examination of specific policy issues further illuminates the differences between U.S. and EC law. No consensus exists on the distinction between successful consolidation and the abuse of monopoly power, on when vertical supply and purchase commitments encourage productive


45. See DeBow, supra note 38 (describing state enforcement).

46. For description and criticism of this regime, see Frank H. Easterbrook, Antitrust and the Economics of Federalism, 26 J.L. & ECON. 23 (1983).

47. At the risk of unnecessarily complicating things, I wish to preserve the distinction between the European Union, based on the Maastricht Treaty as amended, which provides a framework for economic, foreign affairs, and police cooperation among the twenty-five members, Treaty on the European Union, Feb. 7, 1992, O.J. (C 191) 1 (1992), and the European Community, a legal structure created by the Treaty of Rome as amended, Treaty Establishing the European Community [hereinafter EC Treaty], which provides the legal basis for economic regulation and, in particular, competition law. Thus, one can say that EC competition law applies in the European Union. In other words, the European Union is a place, while the European Community is a source of law.

48. EC Treaty art. 81.

49. EC Treaty art. 82.

50. Fox, Races, supra note 1, at 1798.

51. Id. at 1793.

52. EC Treaty arts. 83(2)(e), 86(1), 87(1); Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 593.
firm-specific investments and when they unnecessarily restrict consumer choice, or when predatory pricing constitutes a genuine threat to consumer welfare and when the strategy contains the seeds of its own frustration, thus making regulatory intervention unnecessary. Some of these differences undoubtedly reflect empirical uncertainty, but others suggest disagreements over policy not caused by a commitment to maximizing either global or local welfare.

Japan has the Antimonopoly Act, a substantive competition law that in form follows closely that of the United States. But its Fair Trade Commission, although perhaps not quite the lapdog that some commentators portray, has not had the opportunity to develop as rich and informative a practice as have its U.S. and EU counterparts. It has brought criminal prosecutions against core anticompetitive behaviors, such as price-fixing and output restrictions undertaken by groups of producers. However, it has not attacked other practices that result in significant costs to Japanese consumers, and it has no influence on government policies that protect numerous small producers from efficient competition by consolidated firms.

3. Vertical Variation

Turning to evidence of vertical variation, one can describe incidents where protection supplies the most plausible explanation for what happened. My examples are sufficiently representative to at least create a presumption that such protection through selective competition rules does occur.

At the outset, note that for each of the major economic powers, the institutional structure of competition law discussed above facilitates vertical variation. The use of broad, nonspecific standards maximizes enforcement discretion, as opposed to precise rules that would tie the enforcer's hands. Of course, there exist other plausible explanations for the choice of form. The enforcement bureaucracy may seek to maximize its discretion for reasons unrelated to protection, and even a welfare-maximizing lawmaker might regard bonding costs as unacceptably high relative to

53. Compare Cont'l TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (holding that suppliers' promoting interbrand competition through vertical restrictions that limit the number of retail franchises and restrict the sale of product does not violate the Sherman Act), with Case 15/74, Centrafarm v. Sterling Drug, Inc. 1974 E.C.R. 1147, [1974] 2 C.M.L.R. 480 (1974) (holding that a trademark owner's increasing competition by prohibiting or restricting the sale of the product in another Member State violates the Treaty relating to the free movement of goods). For general discussion of substantive differences between U.S. and EC competition law, see Gifford & Kudrle, supra note 10, at 230-34. For debate within the academic community about the appropriate approach to predatory pricing, compare John R. Lott, Jr., Are Predatory Commitments Credible?: Who Should the Courts Believe? (1999) (concluding from empirical analysis that predatory pricing is unlikely to occur in the private sector but that it can and does occur in the public sector), with Peter H. Huang, Still Preying on Strategic Reputation Models of Predation, 3 Green Bag 437 (2000) (arguing that predatory pricing commitments are sometimes credible and thus could justifiably be regulated).

54. See Haley, supra note 41, at 154-57, 162-68.
other means of supervising the enforcement process. Nonetheless, it is relevant, although by no means decisive, that the substantive competition laws of the United States, the EC, and Japan all give regulators the kind of discretion that impedes the detection of discrimination through monitoring. The presence of motive and opportunity to discriminate against foreigners strengthens, although it does not prove, the case that these systems promote vertical variation.

Examples from all three jurisdictions indicate that the discretion enforcers enjoy has allowed actions that seem inexplicable except as a way of advancing the interests of local producers. I begin with the United States. Several recent suits brought by both the government and private litigants reek of protectionism. During the run-up to the 1992 presidential election, the George H.W. Bush Administration, pressed by candidate Clinton’s charges that it did not adequately protect U.S. producers from foreign competitors, announced that it would abandon the Reagan Justice Department’s position that, except in limited instances, U.S. antitrust law would not address foreign anticompetitive practices that had no significant impact on U.S. consumer welfare.\(^\text{55}\) Once in power, the Clinton Administration carried through on its campaign posture, bringing and settling a suit against a British firm that allegedly imposed licensing restrictions on the use of its patented technologies to restrict the production of flat glass manufacturing outside the United States.\(^\text{56}\) The following year, it obtained an indictment against a Japanese paper company for participating in a conspiracy to fix the price of thermal fax paper.\(^\text{57}\) Both actions rested on dubious economic theories but succeeded in signaling a willingness to punish foreign producers to the advantage of their U.S. competitors.\(^\text{58}\)

The private suit that most clearly reflects conventional trade protection is the epic battle between U.S. television set manufacturers and the Japanese consumer electronic industry. The district court, the Third Circuit, and four Justices of the Supreme Court embraced a theory that producer collusion in the Japanese market, coupled with successful price competition in the U.S. market, sufficed to make out a violation of the Sherman Act.\(^\text{59}\) This theory merges antitrust law with antidumping law, inasmuch as the latter gives relief to U.S. producers seeking protection from foreign competitors without requiring any proof of predation or other harm to U.S. consumers. In effect, the U.S. television industry was seeking compensation for its failure to compete with the Japanese producers. A few


\(^{58}\) By contrast, the courts have shown no willingness to punish domestic producers that collaborate with the U.S. government in inducing foreign producers to join a cartel. See Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136–41 (D.C. Cir. 1974).

years after a narrow majority of the Supreme Court rejected the suit, the parallel with trade law was made explicit, as the U.S. government successfully collected antidumping duties based on the same evidence that the U.S. industry had presented in its failed antitrust suit.\textsuperscript{60}

Turning to the EU, one first notes the Commission's notorious refusals to approve mergers of U.S. firms that compete with important European producers, chief among them the failed Boeing-McDonnell Douglas transaction.\textsuperscript{61} The suspicion that the Commission sought to give a leg up to Airbus, Boeing's great rival, has been impossible to suppress. Merger regulation hardly represents the only Commission activity that smacks of protectionism. Other examples involve prosecutions for abuse of dominant position. This concept, although superficially similar to Section 2 of the Sherman Act's prohibition of abuse of monopoly power, in practice has a broader reach that seems to disproportionately target successful competition by non-EC firms.\textsuperscript{62} A classic case is its prosecution of United Brands, an American banana producer.\textsuperscript{63} Not only did the Commission embrace an improbable theory of abuse, but it acted against a background of Community trade regulation that systematically protected banana companies located in former European colonies from competition by United Brands.\textsuperscript{64} Consumer welfare, in particular that of banana-loving Germans, mattered not at all here.


62. For a more general argument by European scholars that the Commission exploits its merger review for protectionist purposes, see NiHAT AKTAS ET AL., EUROPEAN M&A REGULATION IS PROTECTIONIST (UCLA, Anderson School of Mgmt., Working Paper No. 6-04, Mar. 6, 2004), available at http://www.anderson.ucla.edu/documents/areas/fac/finance/6-04.pdf.


64. World Trade Organization Dispute Panel Report, European Communities—Regime for the Importation, Sale, and Distribution of Bananas—Complaint by the United States 27-35 (May 22, 1997), available at http://docs.on-line.wto.org/DDFDocuments/t/WT/DS/27RUSA.WPF (asserting that the EU scheme regulating the banana trade was illegal); World Trade Organization Appellate Body Report, European Communities—Regime for Importation, Sale, and Distribution of Bananas 51–80 (Sept. 9, 1997), available at http://docs.on-line.wto.org/80/DDFDocuments/v/WT/DS/27ABR.WPF (finding that the banana trade regulatory scheme violated GATT).
In Japan, prosecutions of foreign firms are not as prominent as tolerance of private collusion to keep out foreign competition. In this respect, Japanese competition policy represents the stance of much of the world outside of North America and Europe. Weak or nonexistent regulation of anticompetitive practices reflects the preferences of local producers, who seek monopoly rents both through domestic collusion and obstruction of import competition. Some proponents of strategic trade theory initially saw Japan's competition law as one element of a comprehensive trade and development program. More recent scholarship suggests that the government simply accepts, and does not manage, industry-led cartelization. In a complaint brought to the WTO, the United States argued that Japan's tolerance of inefficient retail distribution systems constituted a trade barrier in violation of the General Agreement on Tariffs and Trade ("GATT"), but the WTO rejected the claim.

Finally, all major industrial economies display a particular kind of substantive convergence. Virtually every country expressly exempts export cartels from its competition law. This practice manifests a welfare calculation that gives no weight to foreign consumers, and suggests some indifference to local consumers who probably bear some costs from foreign export cartels. Regarding the exemption of export cartels as a global norm, rather than as local aberrations from good competition policy, reinforces the impression that competition law, among its many functions, serves as a source of trade protection.

I do not maintain that these examples prove that competition law inherently or primarily operates as a tool for protection. I argue only that it is susceptible to such pressures, and that one can document instances where countries have succumbed to these pressures. The evidence undermines the conception of competition policy as something separate from, and motivated by different values than those driving, trade policy. Our understanding of why states restrict international trade also may illuminate our expectations about why and when governments, and, to a lesser degree, private litigants, invoke competition law. This insight leads to an obvious conclusion: If international cooperation is an effective means of


67. See McGinnis, supra note 1, at 568.

68. See JOHNSON, supra note 42, at 227.


advancing trade liberalization to the benefit of general welfare, then it will lead us to a better international antitrust regime as well.

D. Summary

Competition policy embodies imprecise normative judgments that invite controversy and defection rather than consensus and commitment. Because its scope extends to such a wide range of economic activity, it has the potential to inflict significant costs on many participants in international trade. In particular, it tempts states both to impose nominally neutral policies that favor local producers and consumers at the expense of global welfare, and to administer their policies in a discriminatory fashion to similar ends. Uncertainty about the willingness of states to pursue this strategy further burdens international transactions.

If we cannot expect states to develop a coherent competition policy for international transactions in the absence of coordination, should we seek to create some mechanism that will coordinate national competition policies? What would such coordination look like, and what problems might it engender? I now turn to these questions.

II. Visions of International Antitrust

The previous section establishes that states engaged in significant international trade face strong incentives to adopt competition laws that do not maximize global welfare. States whose producers mostly export, or whose consumers do not have significant market power with respect to foreign producers, have little need for competition laws at all, other than as cosmetic gestures to appease foreign critics. Japan may be a case in point. States that have significant market power, but do not provide a home to producers, may insist on levels of competition that may benefit their consumers but lower efficiency. States in a race to host increasing-returns-to-scale industries may block consolidation by rival firms while protecting the national champion. All states may avoid bright-line competition rules in favor of nonspecific standards that permit selective prosecution of foreign producers to advance protectionist ends.

Each of these outcomes maximizes local welfare at the cost of global efficiency. Superimposing the laws of multiple jurisdictions with different standards on a single firm would function simply as a tax on firms that operate internationally. And a tax on globalization seems perverse and harmful.

What is to be done? Experts have suggested various strategies for harmonizing and unifying global competition law. One would locate negotiations over the content of an international agreement to harmonize competition law in the WTO and give that organization the authority to enforce such an agreement. The current WTO negotiations, the Doha Round, have embraced competition law as a topic, although no concrete proposal has yet emerged. Alternatively, the major economic powers might agree to allocate regulatory jurisdiction in a way that minimizes conflicts
among regulators. A series of bilateral agreements to which the United States is a party represents a modest step in this direction, and scholars have suggested other architectures for jurisdictional allocation. I first describe what these proposals might look like and then discuss their drawbacks.

A. International Coordination of the Substance of Competition Law

In both the United States and Europe, the history of competition regulation has been one of gradual ascension from the smaller to larger political units—in the United States from the states to the federal government, and in Europe from nations to the EC. Should this progression continue, so that an international body would take on the responsibility of regulating the competitive practices of international businesses? Proposals to do so exist in both soft and hard versions.

1. Proposals for International Administration of Competition Law

Many, perhaps most, specialists writing on international antitrust have supported, at a minimum, soft harmonization of competition laws among states. For example, the OECD, a group that comprises the world's richer nations, has promulgated guidelines for competition policy to which its members should adhere. These establish a minimum level of regulation that each state should impose and also suggest a baseline to which they should gravitate. In 2000, the U.S. Justice Department's International Antitrust Advisory Committee called for greater standardization of merger review, technical assistance to encourage the creation of competition policy and enforcement agencies in countries that have none, and the gradual assimilation of international practice leading toward the standardization of competition policy rules. This report led to the creation of the International Competition Network ("ICN"), an international organization of government regulators that sponsors conferences to promote harmonization.

Andrew Guzman and Eleanor Fox would go further. Guzman has called for the forging of an agreement on competition policy modeled on

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73. The documents take the form of Council Recommendations, which the OECD publishes, along with documents on related issues, at http://www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463,00.html (last visited Aug. 24, 2004).
76. See ICN Billboard, supra note 1; Ministerial Declaration, supra note 1; see also Fox, Doha Dome, supra note 1, at 917, 929.
the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). He would have the WTO serve as the forum for negotiating the substance of such an agreement, as the agency that enforces the obligations imposed by the agreement, and as the adjudicator that resolves disputes over the meaning of its provisions. Guzman argues that because harmonization would require some states to forego regulatory choices that would advance, at least in the short run, their national interests, negotiations must take place in a structure that maximizes the opportunity for winners to compensate losers with concessions in areas unrelated to competition policy. The WTO, which has 147 member countries and is involved in the regulation of trade in goods and services, intellectual property, agriculture, health, safety, and some forms of investment, seems ideal for such negotiations because of both its scale and scope. 77

Guzman also has argued for changes in the organizational structure of the WTO to accommodate its expanded jurisdiction. He calls for the division of the organization into departments, each with responsibility for substantive areas such as trade, competition, environment, labor, and intellectual property. Depicting these policy areas as rivalrous, he would have each department act as an advocate for its particular subject and rely on WTO internal dispute resolution processes to reach compromises. 78

The bold new world that Guzman hopes to usher in would entail a single body of competition law applicable to firms operating internationally. States would enforce this law, but a department of the WTO would supervise their actions to ensure that they neither neglected their obligations nor exceeded the international regulatory limits. To the extent conceptions of optimal competition law conflicted with those of, say, intellectual property, labor standards, or food safety, the WTO would make trade-offs and then require WTO members to honor them. 79

Fox has a less ambitious, or perhaps more idealistic, vision, although hers shares essential elements with Guzman's. She would give the ICN a greater role in formulating an international consensus on antitrust policy, although she would rely on the WTO for administration and enforcement of that consensus. She believes that states ultimately will develop a unified sense of what constitutes an "antitrust harm" and will recognize a universal right to address such harms. 80 She does not invoke, but her argument suggests, the rhetoric of international human rights law, which presupposes a cosmopolitan international commitment to the eradication of certain universally condemned practices.

2. Critique

In previous work, I have questioned the value of proposals such as

77. See Guzman, Lesson, supra note 1, at 951-56.
78. See Guzman, Global Governance, supra note 7, at 331-33, 341-45; Guzman, International Antitrust, supra note 1, at 1545-46.
79. Id.
Guzman's and Fox's. Summarizing my objections here, there are weaknesses in the concept of international cosmopolitanism; international administration of nontransparent regulatory programs generally, and international dispute resolution derived from these programs in particular, raise serious agency cost issues; executive branch representation of national interests in international negotiations has potential drawbacks; and unwinding failed international regulatory structures presents distinctive difficulties. Taken together, these arguments lead one to search for alternatives to the globalization of competition policy.

a) Cosmopolitanism

Fox invokes the spirit of cosmopolitanism to support an optimistic account of why many far-flung states ultimately may reach a consensus on the content of competition policy. This concept has become fashionable lately in certain academic circles, although I do not know if Fox intends to invoke all that its advocates assert. International cosmopolitanism takes Rawlsian arguments for justice to the international level, asserting that thoughtful people would commit to a level of equality for all humans and therefore would embrace massive transnational wealth transfers. In particular, because transnational wealth redistribution achieved by individual actions seems overambitious and morally heroic, this body of thought justifies strong redistributive programs by states.

Fox suggests that the broad claims of cosmopolitanism apply specifically to international antitrust. If one accepts the premise that variations among national competition policies reflect differences in local welfare, then any convergence toward a global standard would entail making some groups in some countries better off and others worse off, and probably would diminish the overall welfare of at least some countries, say OPEC members. Recognition of a universal right of freedom from competitive injury thus implies a commitment by states to international wealth redistribution.

While arguments for equality and the redistribution needed to attain it have a certain appeal, the ambitious claim of international cosmopolitanism has serious difficulties. First, the idea that solidarity transcends distance—that people can identify with and care equally about persons at a great cultural as well as physical remove—seems fanciful as a positive matter and problematic as a normative one. One does not have to surrender any part of a core commitment to respect and care for all humans to recog-

81. See sources cited supra note 4.
nize both that people flourish among their familiaris, and that a great variation in culture and environment reflects the natural and desirable variety of humans and their corresponding social needs. Rawls recognized this problem when he limited his call for international justice to nations sharing similar values and political systems.85 Jack Goldsmith has observed that, to the extent state policies reflect the preferences of subjects expressed through the processes of liberal democracy, state actors are justified in taking these affinities into account.86

Second, implicit in the cosmopolitan argument is an equation of financial resources with freedom from physical brutality. It is easy to derive from Rawlsian principles a commitment to protect all people from murder, torture, and other forms of state cruelty, and the cosmopolitan position simply extends the point to material well-being. However, this equation of physical integrity and economic status is more slippery than the cosmopolitan argument acknowledges. Communities vary wildly in how they express and value economic status. Wealth is a social, and therefore local, artifact to a far greater extent than is physical inviolability.87

Third, wealth transfers require exactions from the source of wealth, as a voluntary surrender of resources never seems to suffice. Thus, the threat of force, even if only in the form of economic sanctions, is a necessary complement to a redistributive project. This in turn means that the risk of international conflict is deeply embedded in international redistribution. In the case of competition policy, enforcement of a common norm would entail some entity authorized to impose sanctions on shirkers and malfeasors. However, one cannot contemplate the use of force without conceding the possibility of its abuse. At its heart, then, the cosmopolitan position, both in general and with respect to international antitrust, contains a commitment to international coercion that requires critical examination.

b) Agency Costs of International Entities

Designing an international body to administer and enforce an agreement on substantive competition policy presents serious issues of institutional design and incentives. It is useful to conceptualize such a body as the agent of the various states that collectively wish to implement an agreement on competition policy, much as the managers of a business serve as the agents of the firm's investors. In both cases, the fundamental problem involves aligning the agent's interests with the interests of its principal to maximize the value of the agency relationship. The principal—the states seeking to implement a collective competition policy—cannot fully anticipate how it wants the agent—here the WTO or some comparable body—to respond to future problems. The principal understands that the agent

86. Goldsmith, supra note 83, at 1677-80.
87. I do not mean to deny the Foucauldian point that physical invasion has aspects of social construction. My point is a relative one, that perceptions of wealth depend more on social structure than do perceptions of pain.
might want to maximize some good—its budget, power, glory, leisure, or compensation—that the principal itself would not want maximized. The principal must respond to this challenge by structuring the agency relationship so as to limit, ex ante, the agent’s discretion, what the literature calls bonding, or by supervising what the agent does ex post, what the literature calls monitoring; otherwise, it will be subjected to tolerating outcomes that do not reflect its own preferences.88

Just as investors cannot just hand over their money to managers and ask only that the managers maximize their return, states cannot ask an international organ simply to choose a competition policy that maximizes global welfare. They must accept the risk that the organ will make suboptimal choices—perhaps embracing a harebrained economic theory or using competition law as a guise to advance some redistributive project—or rein in its discretion through some mix of bonding and monitoring. Bonding, however, forecloses some policy responses that, in hindsight, would turn out to be optimal. Monitoring consumes resources and, if coupled with a right of retaliation, also may induce unwarranted conservatism in the organ’s officials.

These are general problems that have turned out not to be insurmountable in many instances. In the case of international antitrust however, they loom especially large. Two features of competition policy exacerbate the agency problems accompanying a delegation to an international organization. First, the absence of any clear understanding or definition of good competition policy makes bonding more problematic. The architects of an international regime must either find the few areas where clarity and consensus exist and settle for a seriously incomplete regime, or they must trust an international organ with broad discretion. Second, because it is likely that any universal competition regime that increases global welfare will make some countries worse off, effective monitoring of the organ’s performance will only clarify the scope of the injury particular states will experience.89

The history of the GATT and its successor, the WTO, illustrates why adding competition policy to the WTO’s already significant responsibilities may not work. The GATT’s great achievement was postwar liberalization of the international economy through tariff reduction.90 High tariffs are an ideal subject for international cooperation. This form of protection neither disguises itself nor hides its effects. Tariffs single out goods traded internationally for special excises stated in precise quantitative terms, and quantification of their effects presents no great challenge. Thus, reciprocal tariff


89. See generally Stephan, Courts, supra note 4, at 346-49 (discussing the agency problems involved in internationalizing antitrust).

reduction agreements are easy to negotiate, compliance with them is easily monitored, and generally, they do not produce sore losers.

Conversely, when regulation takes the form of case-by-case application of general standards that are shaped by complex policy goals and that carry significant potential for international wealth redistribution, those affected by the regulation and those who impose it cannot easily commit to a mutually beneficial agreement.\footnote{McGinnis & Movsesian, supra note 35, at 566–72.} The experience of the last two decades illustrates the point. The shift in the international trade regime's focus to nontariff trade barriers, including health and safety rules and environmental regulations, has embroiled the WTO in great controversy. The agreements giving the WTO this authority largely involve ambiguous commitments that raise profound interpretative problems. The efforts of the WTO organs to apply these standards to concrete cases has triggered intransigence on the part of the states accused of violations, sharp criticism of the dispute resolution process within the community of trade experts, and passionate attacks from populist forces.\footnote{See, e.g., Robert Howse & Elisabeth Tuerk, The WTO Impact on Internal Regulations—A Case Study of the Canada–EC Asbestos Dispute, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 283, 283–86 (Gráinne de Búrca & Joanne Scott eds., 2001); Alan O. Sykes, Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View, 3 CHI. J. INT'L L. 353 (2002) (discussing technical barriers to trade and the WTO dispute resolution process); Tarullo, supra note 1, at 494 & n.57 (discussing institutional challenges to the WTO's dispute resolution process and citing disputes involving meat hormone regulations, preferences for former colonies in banana imports, and dolphin protection measures in tuna imports).}

The WTO has had little direct involvement with competition policy, but the few instances in which it has engaged these problems illustrate the shortcomings of international supervision of national competition law. In the Kodak–Fujitsu dispute, the WTO dispute settlement process rejected the claim that Japan's tolerance of inefficient retail distribution networks, which impeded the entry of foreign products, constituted an impermissible trade barrier.\footnote{WTO, Photographic Film, supra note 70, at 202–16.} The case had murky facts and suffered from less than deft advocacy by the United States, but it still suggests the difficulty of detecting disguised protection. Arguably, Japan tolerates the gross inefficiencies of small scale retail outlets in part because this structure protects domestic producers from foreign competition.\footnote{World Trade Organization Appellate Body Report, United States—Anti-Dumping Act of 1916, available at http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/136ABR.doc [hereinafter WTO, Anti-Dumping].} However, the inference necessary to reach this conclusion was beyond the grasp of the WTO.

A symmetrical dispute involving U.S. antitrust law reinforces the point. The case involved a European attack on the Anti-Dumping Act of 1916.\footnote{WTO, Anti-Dumping, supra note 70, at 202–16.} This statute, as interpreted by the U.S. courts, simply recapitulated the substantive requirements of a predatory pricing violation under
the Sherman Act.\textsuperscript{96} No criminal or civil suit under the 1916 Act had ever succeeded. But, because in form, the 1916 Act regulates dumping in a matter not authorized by the WTO agreements, the WTO condemned it as violating U.S. obligations under the 1994 Agreement on Anti-Dumping Duties.\textsuperscript{97}

Formalism provides the key to understanding both decisions. The WTO has not found it possible to deal with costly but hard-to-prove de facto discrimination, but had no difficulty with a purely hypothetical case of de jure discrimination.\textsuperscript{98} Transparent but innocuous conduct brought about WTO condemnation, while nontransparent but potentially harmful conduct generated no response. Both decisions reflect a reluctance to stray from the uncontroversial meaning of the agreements that form the organization's charter, even at the cost of the substantive ends that these agreements purportedly pursue. One cannot expect much more from any future agreement on competition policy.

As noted above, Guzman appreciates the present deficiencies of the WTO. His response to this challenge is Weberian. He would rely on bureaucratic rationality embodied in distinct, policy-defined departments to formulate good policy and negotiate the competing interests.\textsuperscript{99} In effect, he would replace national governments representing the material interests of their producers and consumers with technocratic elites guided by substantive expertise.

The ambition of this proposal is so remarkable that one wonders where to begin a critique.\textsuperscript{100} The classic concern about bureaucratic rationality is that it masks a powerful urge for aggrandizement. In the international arena, we have few if any examples of agencies that have avoided the temptation. Budgets grow, capacities for effective intervention decline, and faith in international policymaking falters, only to rise up again in new areas. Geneva seems a graveyard for past idealism, not a hot-bed of innovative solutions to the world's problems.

c) Dispute Resolution

Limiting an international agency to the task of settling disputes over the meaning and application of an international agreement does not avoid the agency problems discussed in the prior section.\textsuperscript{101} U.S. practice illus-

\textsuperscript{97} WTO, Anti-Dumping, supra note 95, ¶ 155 at 41. After the WTO decision, one litigant did persuade a federal district court that the 1916 Act requires a lesser showing from a plaintiff than does a predatory pricing claim under the Sherman Act. Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd., 321 F. Supp. 2d 1039 (N.D. Iowa 2004).
\textsuperscript{98} For discussion, see Stephan, Courts, supra note 4, at 349.
\textsuperscript{99} See Guzman, Global Governance, supra note 7, at 307-09.
\textsuperscript{100} For a discussion that anticipates Guzman's proposal and, to my view, advances devastating objections, see McGinnis & Movsesian, supra note 35, at 552-66.
\textsuperscript{101} But see id. at 572-89 (arguing that the WTO dispute resolution is beneficial). I consider the McGinnis-Movsesian argument strongest where the WTO addresses disputes over clear and therefore transparent principles. As the clarity of the principle dissipates, so does the likelihood of efficacious dispute resolution.
trates how the application of indeterminate standards shifts discretionary authority and the capacity to shape policy to the dispute resolution body. In the United States, antitrust law is what the courts say it is, largely without congressional input into the policy’s content. In theory, an international tribunal might follow in the footsteps of the U.S. judiciary and become the principal source of international competition law. In reality, this hope is implausible.

U.S. federal judges have life tenure and a great fund of social capital. They come to the bench after achieving distinction in any of a number of legal fields, and they wind up on the Supreme Court after facing intense public scrutiny and surviving a daunting political gauntlet. They benefit from a tradition of judicial lawmaking that, for the most part, has gained acceptance and even admiration from the general public.

None of these statements can be made about the members of the WTO dispute settlement bodies or, for that matter, any adjudicator in the international system. The members of the WTO appellate body, the closest analog to a common law appellate court, serve for four years, with nomination and replacement at the pleasure of specific countries or blocs, rather than of the WTO membership as a whole. Given this short leash, the possibility for articulating and imposing a competition policy that any significant state finds undesirable seems unlikely except over the very short run.

**d) Executive Branches as National Agents**

In both international bargaining and monitoring of international agencies, states act through their executives, not their parliaments. For states operating under some version of the Westminster system, where the leading parliamentary party forms the executive, this point may not have much significance. However, even in these countries, actors within the executive may have interests that diverge from those of the legislature, including possibly a preference for larger budgets, projects that show off the executive to good effect, and work that increases the actors’ future returns from their postpolitical careers. Further, in many states, the executive operates under the influence of a different political party from that enjoying dominance in the legislature. This separation may exist even if the executive answers directly to parliament, as in those Westminster-type systems in which no single party controls the legislature.

I previously have argued that these factors may express themselves as a tendency of governments to commit to harmonization and unification projects that produce little hard law but provide officials with high-profile

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102. See Standard Oil Co. v. United States, 221 U.S. 1, 59–60 (1911) (concluding that the Sherman Act must be applied with the “rule of reason,” giving courts more discretion than under a per se test).


104. See Stephan, Courts, supra note 4, at 337–38.
venues to display themselves. One might even suggest that the ICN is a manifestation of this tendency. These efforts may seem harmless enough, but they have the potential to destabilize the legal environment in which firms operate. They may distract individual states from desirable changes in their competition laws, induce cosmetic changes to appeal to the international audience, and send confusing signals to bureaucrats and judges responsible for interpreting and applying national law.

B. Inflexibility in the Face of Changed Circumstances

Law-based international institutions are hard to create and even harder to reform. The principle of unanimity that applies to treaty systems means that amendments, like the initial institution, require unanimous consent. As circumstances change, it often becomes desirable to alter the mandate and tools of the regime, but holdouts are likely. For this reason, international regimes tend to administer broad standards and norms rather than precise rules, and they tend to collapse or become irrelevant rather than reform themselves. Important counterexamples exist, but compared to both private firms and states, international organizations manifest inferior adaptive capability.

C. International Coordination of Regulatory Jurisdiction

Recognizing the many obstacles to substantive harmonization of competition law, some governments and commentators have considered coordination of jurisdiction as an alternative way of addressing the overlapping jurisdiction problem. The ideal is universal acceptance of jurisdictional criteria that would submit transactions to one, and only one, regulatory authority. The search for jurisdictional stability underlay the forty-year struggle between the United States and its trading partners over the "effects" test for antitrust jurisdiction as well as justifying the various agreements between the Justice Department and other states on antitrust enforcement.

1. Allocations of Regulatory Jurisdiction

In a simpler world of mechanical and formalistic jurisdictional tests, overlapping regulatory authority did not pose a problem. Only the sovereign on whose territory a transaction occurred would impose its rules.

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105. See Stephan, Accountability, supra note 4, at 695-97.
108. See International Antitrust Enforcement Assistance Act, 15 U.S.C. §§ 6201-12 (1994) (authorizing the Department of Justice to enter into agreements with foreign antitrust authorities to exchange information to facilitate antitrust enforcement). Agreements entered into by the Department of Justice pursuant to the International Antitrust Enforcement Assistance Act can be found at http://www.usdoj.gov/atr/public/international/int_arrangements.htm.
With the rise of multijurisdictional transactions however, territoriality came under pressure. U.S. courts first relaxed the territorial test by requiring that only some part of the transaction in question occur in U.S. territory. By the end of World War II, the lower courts cast aside even that constraint, instead applying U.S. antitrust law to any action that had direct and intended effects in the United States. Initially, Europe and the Commonwealth countries resisted this approach, but by the end of the 1980s the EC had incorporated the effects test into its own competition law.

Almost as soon as the effects test emerged as the U.S. standard for international antitrust, some courts and commentators proposed to limit it. It is unclear whether the critics foresaw the potential costs of multiple regulation or simply disliked the foreign criticism that the test generated. For whatever reason, their efforts dominated most discussion of international antitrust during the 1970s and 1980s. The leading treatise on international antitrust proposed that courts use a "rule of reason" based on multiple criteria to limit U.S. jurisdiction in cases that otherwise satisfied the effects test. The object of the test was to restrict the exercise of jurisdiction in some instances where the effects test would permit regulation. It did not purport to create a world where every transaction would have one and only one regulator, but it did aspire to reduce the instances of multijurisdictional conflicts.

The Ninth Circuit embraced the rule-of-reason standard, and the Third Restatement of the Foreign Relations Law of the United States proclaimed it the general norm. The campaign to limit antitrust jurisdiction suffered a setback in 1993, when, in Hartford Fire Insurance Co. v. California, a narrow majority of the Supreme Court both endorsed the effects test and rejected the rule-of-reason limitation. In 2004, however, the Court in dicta seemed to reinstate this limitation.

As this account illustrates, disputes over jurisdictional scope typically take place in the judicial arena. Legislators typically fail to address the issue of extraterritorial regulation, and courts usually craft choice-of-law rules to fill in statutory lacunae. In the case of antitrust, however, some

111. United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 443-44 (2d Cir. 1945).
113. See JAMES R. ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 166 (1981) (referring to the rule-of-reason standard as a "balancing process").
intergovernmental agreements also seek to distribute regulatory jurisdiction. The U.S. Justice Department has negotiated compacts with Australia, Canada, the EU, Japan, and Mexico, among others.117

Superficially, these agreements appear to address the problems of overlapping regulation. A review of their terms, however, reveals that they do not even create soft law. Rather, the bilateral agreements express only a desire to consult and cooperate, and do not limit the discretion of any regulatory authorities.118 None of these instruments has terms that a U.S. court could enforce, and the United States-EC agreement only provides the EC Commission with additional grounds for making demands of national regulators.119 All but the agreement with Australia purport to embrace the rule of reason as the basic concept for allocating regulatory jurisdiction, but all use a long list of unweighted criteria that have the effect of insulating almost all exercises of regulator review from attack.120 Moreover, the agreements do not seek to coordinate merger approval, the area that has caused the greatest recent tension. If anything, the bilateral agreements illustrate the conflicting interests that jurisdictions have in imposing their competition law on international transactions and the difficulties of surrendering regulatory discretion in spite of the potential benefits obtained by a reduction of overlapping constraints on private transactors.

Finally, one should note the ongoing negotiations regarding a Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters.121 This multilateral instrument, if adopted, might limit the power of a signatory state to exercise some regulatory jurisdiction over extraterritorial transactions, and would make civil judgments


119. See EC Antitrust Agreement, supra note 118, arts. VI, VII.


produced by proceedings that conform to the convention subject to execution by all parties to the Convention. However, no one who follows these negotiations seriously believes that the United States will sign the Convention or that Congress would accede to it. Rather, even this modest attempt to reach an international consensus on the allocation of regulatory jurisdiction seems an entirely academic exercise.

To summarize, the courts have supplied three different strategies for allocating regulatory jurisdiction. The territorial approach would severely limit the scope of competition law in cases where production took place offshore. The effects test maximizes a state’s regulatory power. The rule of reason muddles these two approaches. In theory, states might agree to concrete and specific allocations of authority, but nothing achieved to date meets this description. To the contrary, the agreements we have suggest the difficulty of imposing significant constraints on national regulatory power.

2. Critique

The use of rules that allocate regulatory jurisdiction as a substitute for unification of substantive law is most closely associated with U.S. corporate law. During the last decade Roberta Romano has produced an influential reappraisal of this subject. Her work has developed a conceptual apparatus that translates into other substantive areas and, in due course, has led to a rich and lively scholarly debate about regulatory competition generally.

As Romano observed, the challenge is choosing jurisdictional criteria that will not promote a flight of transactions to a jurisdiction that permits significant externalization of the transactions’ costs. Her work is a response to the traditional critique of the formalistic U.S. choice-of-law rule for corporate law—the law of the place of incorporation applies—which asserts that managers incorporate in jurisdictions that maximize their

122. See id. at arts. 4, 18.
125. See ROMANO, COMPETITIVE FEDERALISM, supra note 123, at 83-86.
opportunities to enrich themselves at the expense of investors. The “race to the bottom” metaphor arose in this context.\(^{126}\)

Romano demonstrated that managers often will have to internalize the costs associated with rules that enabled them to exploit investors, and thus should have a preference for rules that maximize firm value.\(^{127}\) She found in corporate law a virtuous race to the top, where her predecessors had seen only a regrettable regulatory collapse. Stephen Choi and Andrew Guzman extended her argument to the international arena, advocating a regime that would allow the issuers of securities to choose which jurisdiction would regulate their transactions.\(^{128}\)

A consensus does not exist regarding the validity of Romano’s empirical claims about U.S. corporate law, much less Choi and Guzman’s extension. The debate focuses mostly on the supply rather than the demand side, involving arguments over the willingness of states to compete for corporate charters.\(^{129}\) Most scholars, however, agree with the analytics underlying Romano’s claim. The degree to which formal and transactionally determinable choice-of-law rules should apply depends primarily on externalities.\(^{130}\) To the extent that the ratio of externalized costs to benefits matches that of those internalized, the transactors, at least if they meet minimum standards of competence, should have the freedom to choose their regulatory environment. Under these conditions, a race to the top can occur.

Using Romano’s framework, the argument that competition regulation is susceptible to a race to the bottom, and therefore should not be subject to transactor choice, is straightforward. At its heart, competition law involves producer conduct, either unilateral or in concert, that may have harmful

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\(^{127}\) See Romano, Genius, supra note 123, at 33-36.


effects on consumers. Allowing producers to choose which regime will regulate the harm they impose on consumers would make sense only if consumers could boycott producers that choose consumer-unfriendly regimes. However, competition law, at least in theory, focuses on exactly the kinds of producer actions that reduce consumer choice. If the touchstone is the likelihood of externalities, producer choices about competition law generally should have no significance.\footnote{131}

Straightforward analysis also demonstrates that none of the three rules used by the courts for allocating state regulatory jurisdiction will produce optimal outcomes.\footnote{132} First, a universal commitment to territoriality would prevent a state from regulating offshore producers intending to limit competition in the state’s market, thus creating inefficiencies. Barring all such desirable regulation can be justified only if one can demonstrate that on balance extraterritorial regulation would decrease welfare. Some states, however, might limit competition rules to cases that both maximize efficiency and increase consumer welfare. Moreover, in industries where production is moveable and firms thus can induce states to compete for their activities, producers would exploit a territoriality regime to move to states with producer-friendly regimes.

Symmetrical arguments expose the flaws in the effects test. That approach multiplies the number of states with jurisdiction over transactions and thus increases the likelihood that private organizational decisions will confront governmental resistance. As with the territorial rule, whether governmental intervention will increase welfare constitutes an empirical consideration. There is no categorical reason to believe that the benefits from desirable competition rules permitted by the effects test necessarily will be greater than the costs generated by inefficient regulation.\footnote{133} The most one can claim for the effects test is that it maximizes sovereignty by allowing states to choose the scope of their regulation free

\footnote{131. Some subjects, such as contracts implementing vertical cooperation, may present sufficiently debatable competition issues to justify deference to the transactors. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (enforcing contractual choice-of-forum provision in cross-border dispute). These contracts typically involve merchants who have some competitive choices before their entry into the agreement and involve project-specific investments that on balance may increase welfare. See generally Charles J. Goetz & Robert E. Scott, Principles of Relational Contracts, 67 VA. L. REV. 1089 (1981) (arguing that relational contracts, including exclusive dealing agreements, allow for proper risk allocation in complex transactions). Under these circumstances, the parties are more likely to internalize the costs of whatever competition regime they choose, and, without the freedom to choose, they may pass up valuable transactions.}

\footnote{132. See Guzman, Choice of Law, supra note 33, at 904-13.}

\footnote{133. William Dodge argues that courts should express a bias in favor of overregulation on the ground that special interests find it easier to block regulation they disfavor than to have enacted legislation that they favor. William S. Dodge, An Economic Defense of Concurrent Antitrust Jurisdiction, 38 TEX. INT’L L.J. 27, 33-35 (2003). The argument confuses prudential concerns with welfare claims. Courts might defer to legislative choices about jurisdiction on the ground that they do not have the capacity to second-guess legislative choices. However, it does not follow that because special interests have a comparative advantage in blocking adverse legislation, only public-regarding regulation will pass through this filter. It is just as plausible that we see less legislation than
of international constraints. But maximization of sovereign choice is not necessarily a good thing. Arguments for expanding individual choice do not translate to the level of the state.\footnote{I previously have criticized commentators that invoke the concept of sovereignty as a justification for particular positions on regulatory jurisdiction. Stephan, \textit{Choice of Law}, \textit{supra} note 4, at 957–60. On close analysis, these invocations invariably turn out to be stalking horses for other substantive claims that require distinct argumentation.}

The one approach that seems unambiguously flawed is the rule of reason. William Dodge misstates the case when he characterizes this approach as producing the same outcome as the territorial method.\footnote{Dodge, \textit{supra} note 133, at 28.} Rather, the rule of reason only increases the likelihood that one state, presumably the place of production, will impose its competition rules. Unlike either the territoriality rule or the effects test, however, the rule of reason contains a high degree of instability and unpredictability. It allows courts to balance unweighted factors on an ex post basis, making reliable guesses about regulatory jurisdiction difficult if not impossible. It creates legal risk without eliminating the costs of either under- or overregulation.

If the judicially crafted formulas for allocating jurisdiction produce suboptimal outcomes, should governments enter into agreements to allocate regulatory jurisdiction? The extant agreements suggest that we already have reached the limits of state-to-state bargains. No state seems willing to submit to serious and enforceable constraints on its regulatory jurisdiction. Two reasons for this reluctance suggest themselves. First, states will not surrender jurisdiction to regulate without some clear and reliable expectation of what substantive rules other states will apply. Second and following from the first, states recognize that the jurisdiction issue simply recasts the question of preferences for substantive competition rules.

This last point also suggests why a global bargain to allocate competition policy jurisdiction may be undesirable as well as unattainable. On reflection, the jurisdictional question presents exactly the same issues and problems as does substantive harmonization. There is no neutral template for allocation that transcends the interests engaged by competition law, and no reason to believe that those interests would not affect the structure of any international bargain. In particular, giving an international agency responsibility for supervising how states exercise their jurisdiction would lead to exactly the same agency problems discussed in the previous section.

D. The Future of International Supervision of Antitrust

The EU, the United States, and most scholars have treated international antitrust as a problem that international institutions can solve. The details of the solutions differ, but they have in common a conviction that an international forum will serve as a means for transcending local inter-
ests of states in favor of global welfare. This faith in international cooperation is misplaced. Analogies to trade agreements do not work, because the interests at stake in competition policy are far less transparent and far more likely to involve international wealth redistribution than those triggered by direct trade barriers. This makes competition law far less susceptible to oversight and satisfactory dispute settlement. We have every reason to believe that international supervision either will be inconsequential, along the lines of existing agreements on international antitrust, or pernicious.

My critique suggests reconsidering what may happen if states do not face international constraints on how they conduct their competition policy. Given certain plausible assumptions about the world economy, in particular those sectors that draw significantly on skill and innovation, an anarchic international environment may contain substantial impediments to a global race to the bottom in competition law. I explore this possibility in the next section.

III. Anarchy, International Antitrust, Innovation, and Investment

In the first part of this paper, I described a static model that predicts what competition law a state will enact and enforce. This model rests on two assumptions: States seek to maximize a weighted sum of local consumer and producer interests, and the choice of competition policy has no secondary effects on consumer or producer welfare. The model regards states as choosing among a fixed set of outcomes that proceed directly from particular competition policies. Choices in one time period do not affect the set of choices available in the next.

A dynamic model, by contrast, assumes that choices made in the first time period alter the possibilities available in the next. I focus on a model of innovation that emphasizes increasing marginal returns and explore the relationship of this model to competition. One inference drawn from this model is that inefficient competition policy can lead to long-term losses in a globally competitive economy.

The question remains whether the static or the dynamic model offers a better fit for particular sectors of the world economy. In industries such as agriculture and natural resource extraction, the distribution of location-specific natural endowments may dominate welfare calculations, and innovation may play a less important role. In these sectors, we would expect to find inefficient industrial structures that generate, or at least seek, monopoly rents, along with significant levels of trade protection. In knowledge-based sectors, however, mobile factors of production—human and financial capital—play a greater role. In these industries, a dynamic model provides a better fit, because protection, either through government regulation or private collusion, may affect access to human and financial capital.

Where the dynamic model applies, international intervention to regulate competition policy may be unnecessary. States that embrace inefficient competition policies to protect local producers or to benefit local
consumers should experience lower rates of innovation and eventually lose the ability to compete internationally. Even though not all economic sectors or states will experience this effect, enough will to call into question the need to institutionalize international competition policy.

A. Knowledge and Industrial Structure

A dynamic model of international competition policy depends critically on the propositions that innovative pressures in some important economic sectors force producers to innovate or exit, that protection from competitive pressure undermines the ability of producers to innovate, and that producers in economic decline will eventually lose political influence as well. I explore each of these propositions in turn.

First, consider the relationship between innovation and market success. A substantial theoretical literature explores the impact of knowledge-based investments on economic growth. In the standard model, knowledge has low reproduction costs. Returns on knowledge thus depend critically on the size of the market in which goods embodying knowledge can be sold. Increases in the scope of the market, such as the creation of the U.S. common market in the nineteenth century and of Europe's in the second half of the twentieth, expand the opportunities for exploiting knowledge and thus rewards investments in knowledge more greatly. Trade liberalization and other strategies for broadening market size thus raise incentives to invest in knowledge.

Recent research tends to support this hypothesis. Studies by Jeffrey Frankel and coauthors have demonstrated a strong positive correlation between trade openness and labor productivity, a good proxy for innovation. A more recent paper by Francisco Alcalá and Antonio Ciccone refines these results by looking at the relationship between productivity and openness in tradable goods, as opposed to gross measurements of an economy's openness to trade. Their analysis shows an even stronger link between innovation and an economy's exposure to international competition. Finally, a study of post-socialist transition economies by Wendy Carlin, Mark Schaffer, and Paul Seabright shows a positive relationship between innovation and the effectiveness of competition law.

It is important to clarify what this work does and does not indicate. Under conventional models of development, a country's economic growth depends both on its physical and human capital and on its efficiency in using these assets. Other considerations, in particular institutional quality, have a strong relationship with levels of capital stocks, and the link between economic openness and institutional quality is not well understood. What the empirical work indicates, then, is not that openness is the most influential factor in economic growth, but that it is an important factor in explaining how effectively an economy exploits the stock of physical and human capital it has.

Other arguments support the proposition that barriers to competition will impede investment as well as innovation. Monopoly rents derive from restricting production below a level that efficient competition would dictate. Lowering production implies, although it does not require, reducing the level of investment in the industry. Barriers to entry, whether imposed by private agreement or the state, implies fewer opportunities for the deployment of capital.141

To be sure, the link between investment and barriers to competition is not as well documented as that between innovation and market size. However, the hypothesis that inefficient limits on competition serve as a barrier to investment is plausible. Some data support an indirect inference. The strong finding in the trade literature that declining industries, rather than infant ones, have the greatest demand for protection suggests that industries that have lost their capacity to attract new investment tend to seek less competitive market structures.142

These claims explain why competition policy that does not pursue efficiency will prove costly to states. First, states that permit local producers to construct inefficient constraints on competition are functionally equivalent to states that undertake such protection directly. Tolerance of inefficient collusion in an industry is likely to lead to lower rates of investment and innovation than otherwise would obtain. For industries that depend significantly on human and financial capital, these losses should lead to low growth or shrinkage in the affected sector. Gradual immiserization eventually should either impair an industry's ability to resist regulation or lead to its economic irrelevance.

Second, states that use their competition law to impose inefficient organizational structures on foreign producers with the object of protecting local producers encourage lower rates of investment and innovation in the protected sector. If bad competition law is the functional equivalent of trade protectionism, then equivalent consequences should follow. The sec-

141. Early statement of the connection between monopolization and reduced opportunities for investment can be found in JOHN A. HOBSON, IMPERIALISM, A STUDY 74–76 (3d ed. 1948).

tor should become increasingly uncompetitive internationally and eventually wither.

One can immediately anticipate a counterargument drawn from one strand of strategic trade theory. Where oligopolists contend for an industry characterized by positive returns to scale, state intervention may tip the balance. This intervention might include punishing foreign producers with competition law to facilitate the local producer's ascendency as the efficient global monopolist. If states generally can choose when to invest in industries that will become globally dominant, then they should include competition law among the tools that they can use to implement such decisions.

Considerable evidences suggests, however, that states rarely do a good job of picking winners. A decade ago many U.S. scholars saw Japan as a model of successful strategic trade policy. Invoking this model, they purported to identify U.S. industries where government-led success would generate great local benefits at no significant global cost. Revisionist studies of Japanese policy reveal that the government generally supported industries that did not have much success in international competition and did little for those sectors—automobiles and consumer electronics—where Japanese producers did enjoy some success. More generally, as noted above, governments tend to weigh in on behalf of declining industries more often than they bestow favors on rising sectors.

This argument for virtuous pressures to produce efficient competition law is subject to two important qualifications. First, states that serve as a base of operations for firms that largely export their products may seek to free ride on the regulatory efforts of importing states. If no single importing state were to consume a substantial share of the global output of such producers, those states might not invest sufficient resources in imposing competition rules. Under these circumstances, consumers over the short run would suffer losses due to excess prices and low supply, while the producing country might witness the eventual decline of the industry it hosts. Here, collective action by the affected states to impose an appropriate competition policy might produce a better outcome.

Second, the argument assumes that states eventually will respond to the decline of local producers by withdrawing the protection that contributes to their decline. There is some point at which this assumption must be correct. An industry that collapses completely must not have any ability

144. VOGEL, supra note 42, at 225–32.
145. Id. at 232–45.
146. See sources cited supra note 42.
to procure desired outcomes from government. However, it does not follow that economic and political decline must be symmetrical. A sense of beleaguerment might lead an industry to overcome internal divisions and concentrate more directly on influencing governmental outcomes. The U.S. steel industry provides a case in point. Although some firms have increased their international competitiveness through increased investment and higher labor productivity, others have used adversity as a ground for procuring repeated episodes of protection from import competition and have made no significant improvements in their production methods. There is plenty of evidence that failing industries can obtain costly protection until collapse becomes imminent.\textsuperscript{147}

These qualifications are important, but do not seriously undermine the claim that virtuous forces make international cooperation less imperative. First, the free-riding scenario seems somewhat hypothetical. States generally have some incentive to protect their consumers from anticompetitive practices, whether or not the local injury is a large portion of the global injury. Most importantly, they do not have to limit their remedies to recovery of the cost of local injury. Criminal sanctions, punitive damages, and injunctions give local authorities the capacity to address a local harm proportionately to its global ramifications.

Second, the disconnect between economic and political power is a general problem and is not limited to local law production and enforcement. Any state that will protect a failing industry by prosecuting its foreign rivals will use its international relations to pursue similar goals. In particular, such a state will block any international accord that takes away its discretion to impose such protection.

I do not mean to suggest that the appeal of a competition law that both frustrates inefficient collusion and does not impede beneficial industrial cooperation is always manifest, or that the consequences of bad competition law are immediately painful. Rather, I make two claims. First, in industries that compete for capital internationally and that can realize significant returns from increases in labor productivity, good competition law matters. Second, the political mechanism that mediates between an industry's economic status and a state's policy preferences should not change when the state pursues those preferences through international cooperation rather than by domestic lawmaking and enforcement. These claims, in turn, suggest that, with respect to economic sectors dependent on human and financial capital, states have some incentive to eschew competition policies that otherwise might generate short-term gains at the expense of global welfare.

B. Regulatory Competition and International Antitrust Revisited

Models of regulatory competition, such as those developed in Romano's work, invoke a stylized market in which states (putative sellers) offer packages of law to firms (putative buyers) under conditions of consumer choice. In these models, states gain some benefit by having firms choose their law and thus wish to attract these buyers; firms choose laws that maximize benefits to the firms' decisionmakers. As I argued above, setting up such a market for competition law seems undesirable. We would expect firms not to choose laws that maximize general welfare, but rather to seek opportunities for monopoly rents. For this reason, we do not find it disturbing that, in the contemporary world, firms have little influence over the choice of competition regulation that will apply to their activities. For the most part, firms can avoid a state's competition law only by abandoning that jurisdiction entirely—neither producing, nor selling, nor basing personnel, nor holding attachable assets in the territory of that state.

The dynamic model of competition laws' effects on innovation and investment, however, introduces an indirect form of regulatory competition. If states compete for capital and opportunities to generate returns from knowledge, they should have some incentive to choose competition law that increases their opportunities for both. Under this model, states would not compete for producers as such, but rather for capital and innovation. To the extent good competition law increases a state's attraction for either, a virtuous cycle may proceed. Such a cycle would substitute for international coordination of state choices.

This vision of virtuous competition for innovation and investment is not as far-fetched as one might think. A conventional story about the rise of Europe, endorsed by a Nobel prize winner and supported by a recent review of the historical evidence, stresses the pressure placed on nearby states by innovation in their neighbors. The evidence suggests that rent-seeking becomes more expensive in the face of a neighbor's technological progress, and that competition among neighbors offers a powerful explanation for a state's willingness to sacrifice vested interests in the service of adaptation. Europe, a geographically fragmented entity, experienced more of this competition; the geographically vast and hermetic empires of China and Russia did not. And in today's world, with lower costs in transportation and communication, geographical contiguity plays less of a role.

This hypothesis requires important qualifications. First, it applies largely to high value-added goods, including services, and not to industries that depend mostly on factor endowments. Second, the mechanism driving the virtuous cycle is considerably less transparent than the seemingly straightforward competition for corporate charters, a contest the existence of which still remains subject to debate. The incentive for virtuous policy involves a long-term effect rather than short-term payoffs. One might plausibly respond that political cycles do not run this long, and that no one can realistically expect political actors to respond reliably to such forces.

These objections have great force. Their rebuttal depends largely on guesses about the future rather than on evidence from the past. The fundamental issue is the nature and extent of the much hyped "new economy" at the international level. For virtuous competition in competition policy to have much purchase, two discernible trends in international economic relations will have to become more pronounced. First, the portion of international transfers involving high value-added goods will have to grow even more. Second, the pace of technological innovation and the response of mobile capital to this pace will have to accelerate. These developments would increase the importance of competition policy and shorten the time between policy choice and economic consequences.

Looking only at the last five years, one might argue that the new economy never was much more than a pipe dream, and that any expectation of its near-term recovery rests on irrational hope more than evidence. If one were to expand the horizon to the past decade, however, the story becomes more complicated and less fanciful. Japan, a country that exports capital rather than investing it at home and that displays considerable structural rigidity and resistance to domestic competition, has experienced zero or negative growth during the period. The EU, whose competition policy has more bite than Japan's but still seems to protect local producers more than U.S. policy, has not enjoyed nearly the same growth in labor productivity or inflows of capital that the United States has seen. Push back fifty years, and the picture becomes even muddier, with postwar recovery driving great early growth in Japan and Europe. One simply cannot make any strong claim, positive or negative.

The possibility that there could be a race to the top in competition law remains intriguing. If one takes my criticism of international cooperation seriously, international anarchy starts to look good. The chance that


150. See authorities cited supra note 124.
trends now at work in the world economy may reduce the need for hard law at the international level should temper our enthusiasm for lawmaking projects that, at a minimum, divert resources, and possibly may exacerbate the problems of international antitrust.

Conclusion

In the last decade or so, economists have developed the concept of "government failure" to complement the traditional notion of "market failure." The idea, roughly put, is that the structure of government can cause suboptimal outcomes and avoidable deadweight losses. The broader implication of the concept is that an analyst cannot make the case for government action simply by identifying a market failure. The question always remains whether a governmental response will make the problem better or worse. The economist's cliché, "Compared to what?" applies here too.

This paper argues that the problem of government failure exists at the international level. To make the point, I have focused on a classic market failure problem, namely private actions that frustrate competition. A conventional analysis suggests that, in a world of international transactions, states will fail to pursue competition policies that maximize global efficiency. Most analysts have understood this argument to dispose of the question of whether some kind of international governance is necessary to respond to the problem, with disagreement limited to the best design of the institutional response. I, in contrast, argue that a significant risk of government failure attends any proposal for serious international governance in this area, and that under certain assumptions the market failure may not be as great as first believed.

Why has the policy consensus so largely settled on a different approach? Perhaps I am simply a contrarian, and the case for some kind of international governance is stronger than I acknowledge. One should consider, however, reasons why the policy debate might be skewed in favor of governance, even in the absence of a strong affirmative case.

A sociological observation might provide one answer. Legal elites benefit from governmental action. They design the structure, staff it, and criticize it. This general point takes on particular salience in the international arena, where messy encumbrances on elite policy formation—elections, competitors, and the like—do not exist. For someone committed to the proposition that ideas and articulateness have a privileged role in policy formation, international governance is an inviting playground.

The possibility that technological innovation and capital might provide a better check on anticompetitive behavior than do government agents is especially disconcerting for members of this class. The people who make these economic forces possible—compulsive tinkerers, lunatic risk-

152. Id.
takers—often have little affinity with the bright, well-spoken, and presentable folks who make legal institutions work.\textsuperscript{153} Ceding power to people who often cannot explain what they do is sufficiently unwelcome that fair-minded lawyers will struggle with evidence suggesting that they should.

I do not claim that this sociological explanation suffices as a ground for governmental inaction across the board. Rather, it suggests that the proponents of new governmental structures, free of the constraints that bind national states, bear a special burden of justification and need to draw on extra reserves of skepticism. The current debate on international antitrust wants these qualities.